IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1948.

No. 57

ALBERTO VARGAS,

Petitioner,

VS.

ESQUIRE, INC.,

Respondent.

PETITIONER'S REPLY TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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Scheffer Printing Company, Del. 7171

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STATEMENT.

The sole question before this Honorable Court at this time is whether the petition for the writ of certiorari shall be granted. The merits of the controversy tried in the District Court we submit are not now being considered. The respondent in its brief as filed herein has entirely disregarded these facts. It seeks to prevail upon this court to look at the cause as if tried *de novo* on the whole record, disregarding the contentions made by petitioner. These contentions are based solely on the disregard by the Circuit Court of Appeals of the findings of fact of the trial court.

In like manner it sought to have the Circuit Court of Appeals try the case *de novo* and that is what was er-

roneously done by that court. These facts appear from repondent's admission in its brief filed herein and in other matters now before this court.

In respondent's brief at page 5 it is stated "It was respondent, Esquire's contention in the Circuit Court of Appeals that *the testimony presented wholly failed to support the Court's conclusions.*" Again at page 6 of the brief respondent states— "Respondent's contentions that the *evidence and findings wholly failed to support the decree* were upheld by the Circuit Court of Appeals." The respondent points to the opinion of the Circuit Court of Appeals wherein the court says— "We think the *decree is without evidence to support it;* hence it should not be allowed to stand." (Italics ours) (R. 805).

These assuredly are not statements evidencing a testing of specific findings to see if they should stand. It is the language of those intent on searching the record to see whether on that record they agree with the decision of the trial court.

Seeking to bring about this review of the entire record respondent's brief consists largely of its version of the pertinent facts in the case. It sets out these facts not with the intention of meeting the matters urged by petitioner in his petition filed herein, but rather in an attempt to persuade this court that, despite any error in procedure of the Circuit Court of Appeals on review, its decision is right on the merits and ought not be disturbed.

When stating facts, purportedly from the record, respondent's counsel invariably misstate and twist the facts; understate some, overstate others; include that which is helpful and omit that which appears harmful to respondent's cause.

In essential respects the statement made by them is greatly at variance with the record. Their statements have no value. It was the influence of such prejudiced presentations on review which it was the purpose of rule 52 (a) to guard against. We shall hereafter comment further on most of these statements. To point out the error in each cannot, and indeed should not be done in this reply.

These statements of fact cannot lead to a denial of the petition. That must be decided on the issues presented and the answer thereto. Those issues simply stated are (a) Did the Circuit Court of Appeals err in its application to this case of Rule 52 (a) of the Federal Rules of Civil Procedure (b) Did that Court err in its consideration of the request for a declaratory judgment. It is respondent's reply on those points which must be considered.

ARGUMENT.

I.

The Findings of Fact Supporting The Trial Court's Conclusion that a Relationship of Trust and Confidence Existed Were Not Findings of Mixed Fact and Law.

The respondent admits those findings of fact set forth in those paragraphs numbered 1, 2, 6, 7, 8, 9, 10, 12 and and 13 on pages 9 and 10 of the petition to be true and valid findings. They should have been accepted and followed. We do not agree that they have no significance in the establishing of a relationship of trust and confidence. Each of the matters and things found in these findings would have a very definite effect in establishing the relationship contended for by petitioner. The Circuit Court of Appeals, however, brushed these findings aside as it did the others. It is of this petitioner complains.

The briefs in the Circuit Court of Appeals are not before the court. It is improper, we submit, for counsel for respondent in its brief to state as facts its contentions as made in its briefs before that court. Respondent states that it was its contention in the Circuit Court of Appeals that the findings of the trial court to the effect: (a) that Mr. Smart was always consulted about the Vargas' places of abode, visited apartments they desired to rent and advised them concerning the furnishing of their apartments; (b) that Mr. Smart for 2½ years after June 1940 was a frequent visitor at plaintiff's apartment; (c) that Mr. Smart had complete control of plaintiff's work done for others and that plaintiff's earnings from such work

necessarily depended on the judgment of Mr. Smart; were not supported by the evidence or that they were erroneous conclusions of law.

A perusal of their brief filed in that court would show no such contention was made. Judge Major in his dissent in the Circuit Court of Appeals states that the only evidentiary finding objected to by the respondent in its brief was that finding that Mr. Smart exhibited an unusual interest in everything pertaining to the life of the Vargas and that as to that finding respondent merely argued that there was no testimony to support so broad a finding (R. 808).

Not only did respondent not complain of these findings, but as a matter of fact none of these findings can be objected to as clearly erroneous because they are abundantly supported by the evidence. To argue that Mr. Smart did not advise concerning their apartments and their furnishings is to disregard the record. (R. 252, 261, 281, 282, 73, 74, 75). To say he was not a frequent visitor to their home because the home was also plaintiff's studio does not wipe out or even weaken the finding. The fact is that the Vargas saw a great deal of Mr. Smart.

The fact is not denied that Mr. Smart controlled Mr. Vargas' income from work for others. It is said that this was only true because Esquire, Inc. was also interested in that work. That cannot vary the fact of control in Mr. Smart and dependence on Mr. Vargas' part bringing plaintiff and Mr. Smart together, nor the fact that Mr. Vargas found Mr. Smart beneficial to him in handling these matters.

It is also true that the respondent certainly does not contend that the above findings were mixed findings of

law and fact, and that they might be disregarded on that ground. It is just as certain that the Circuit Court of Appeals did not in a single instance pass upon the sufficiency of the evidence to support these findings or find any of them clearly erroneous. It is inevitable to conclude they should have been accepted and followed.

Respondent states in its brief (Pg. 7) that the reviewing court considered and rejected as "clearly erroneous" the lower court's finding that Mr. Smart took an unusual interest in everything pertaining to the lives of the Vargas. We submit, at no place in the court's opinion is this finding even mentioned, much less specifically rejected. This is another finding amply supported by evidence which the Circuit Court of Appeals should have accepted and followed. As said by Judge Major, respondent itself in its brief in the Circuit Court of Appeals as to this finding merely stated that there was no testimony to support so broad a finding. We submit the admittedly correct findings in the case referred to above support this finding.

It must appear that one who was interested in the wife of Mr. Vargas coming here to be with him as Mr. Smart was (R. 53); who helped in choosing their apartments and advised concerning their furnishings; who visited at their combined home and studio; who arranged that they might have needed funds; who saw to it that advances were made for luxuries, without asking repayment; who had solely to do with Mr. Vargas' employment and was his close supervisor and guide in his work was interested in everything pertaining to their lives. Even though this interest was dictated by his own selfish interest, Mr. Smart made no declaration of that interest and the acts naturally inspired trust and confidence. That finding clearly should have been accepted and followed.

The most important finding of the trial court is one which distinguished this case from all the cases cited by respondent and the cases relied upon by the majority of the Circuit Court of Appeals. The finding is also one which indelibly stamps the conclusion of the trial court as correct. It is that numbered 14 on page 10 of the petition to the effect that David Smart by his acts became and was the friend and adviser of plaintiff as regards his business and domestic affairs and invited and had the special trust and confidence of plaintiff as regards such affairs far beyond the trust and confidence ordinarily existing between men associated in business as employer and employee. Respondent contends the court could refuse to follow this finding as a finding of mixed fact and law. But this is purely a *finding of fact.* There is nothing of law in it. Whether confidence is reposed on one side with resultant superiority in the other is at all times solely a question of fact. It is so held in the Illinois cases.

In *Commercial Merchants Bank* v. *Kloth,* 360 Ill. 294, at page 302, it was said in discussing this relationship "Where the *facts reveal* that trust is confided in one and accepted by him the fiduciary relation is created." In *Seeley* v. *Rowe,* 370 Ill. 336, at page 342, it was said in speaking of this relationship, "It includes all legal relations such as attorney and client, principal and agent, guardian and ward, and the like, and also every case in which a fiduciary relationship *exists in fact* where confidence is reposed on one side and domination and influence results on the other." Again in *Thomas* v. *Whitney,* 186 Ill. 225, at page 230, it was said "The only question is does such a relation *in fact exist?*" (Italics ours)

As shown by these cases the court's disregard of this

important finding of fact cannot be justified by erroneously denominating it a finding of mixed law and fact. It is a finding of fact which is amply supported by the record. It is furthermore a finding of fact peculiarly within rule 52 (a) of the Federal Rules of Civil Procedure, since it is the kind of a finding, resulting from what the courts call "the feel of the case", only gained by seeing and hearing the witnesses at the trial. No valid excuse can be offered for disregarding this all important finding.

The only possible finding that could be termed a mixed finding of fact and law is the finding that petitioner did not act as a free agent. If it be established that a relationship of trust and confidence existed, then this finding or conclusion necessarily follows. If petitioner, as a matter of fact, was under the influence of a fiduciary relationship, this conclusion that he did not act as a free agent follows, even though it is a mixed conclusion of law and fact.

We do not believe it possible precisely to define the relationship between petitioner and David A. Smart. It was not merely friendly, not merely that of employer and employee, not that of debtor and creditor. It was all of these and a great deal more. One of the prime considerations is that Mr. Vargas was an artist, foreign born and inexperienced in business affairs, while Mr. Smart was one widely experienced in business, who had proved a benefactor to Mr. Vargas. When Mr. Smart, as is undisputed, at the end of Mr. Vargas' first contract, told him that he was going to give him a substantially better contract and asked Mr. Vargas to leave it to him to work it out, those facts alone created a fiduciary relationship as regards Vargas' employment and concerning this very contract.

It is inconceivable how the court or respondent can call this merely a *friendly business relationship* in the light of what is admittedly in the record.

In view of this many sided relationship it was erroneous for the Circuit Court of Appeals in its opinion, and for respondent here, to state, as applying to this case, and particularly to state in the disjunctive, that a relationship of trust and confidence does not arise from belief in the honesty and integrity of a close or intimate friend, *nor* from the relationship of employer and employee, *nor* from the relationship of debtor and creditor. As we have shown, if all those relationships were stated in the conjunctive they would not describe the relationship between Mr. Vargas and Mr. Smart. Not one of the cases cited by respondent as stating the requirements for establishing a relationship of trust and confidence and relied upon by the majority of the Circuit Court of Appeals is decisive of this case. In none of them was it found that any trust was reposed by the parties in question. *Finney* v. *White,* 389 Ill. 374, lays down the rule as to the quantum of proof necessary to establish the relationship. In that case there was no proof whatsoever of trust reposed in the one sought to be charged.

It is stated by respondent (Resp. Br. 10) and by the Circuit Court of Appeals in its opinion (R. 801) that belief in the honesty and integrity of a close and intimate friend will not establish the relationship. Even though we contend the statement is not applicable here, it is certainly a startling statement. We submit it is not a true statement of the law. It assuredly is not supported by the cases cited in the court's opinion (R. 801). In *Bordner* v. *Kelso,* 293 Ill. 175, the evidence was that the parties scarcely knew each other and dealt at arm's length. There

was nothing in the evidence even hinting at a close and intimate friendship or any trust.

In *Higgins* v. *Chicago Title & Trust Company,* 312 Illinois 11, the parties were grain broker and customer. They had dealt at arm's length for years. There was nothing close or intimate in the relationship. The customer felt that Jackson Bros., the broker, would keep their promise in the same manner as one relies on the integrity of any reputable business house. This would not create a fiduciary relationship. But at the same time there was no belief in the honesty and integrity of a close and intimate friend involved in the case.

That the important findings in this case rest on oral disputed evidence is amply attested by the sharp conflict in the statements of the majority of the Circuit Court of Appeals and those of Judge Major and the trial judge. Indeed, it is difficult to see how any finding of fact can be called clearly erroneous when two judges could take the positive views of its correctness that were taken by Judge Major and the trial judge. We have demonstrated that these findings are not findings of mixed law and fact. The cases cited in respondent's brief to the effect that a reviewing court may reject findings which are mixed questions of fact and of law are not here in point. In none of them is the situation remotely analogous. In every one the conclusion was based on undisputed evidence. They truly involved mixed questions of law and fact or were merely interpretation of the law as applicable to undisputed facts.

In *Bogardus* v. *Commissioner,* 302 U. S. 34, the Board of Tax Appeals had held that for income tax purposes, under all the evidence in the case, certain sums given shareholders and others connected with a corporation

were additional compensation rather than gifts. The reviewing court held this holding reviewable, terming it a conclusion of law or a mixed question of fact and law. The basic evidentiary facts were undisputed. The only question was their interpretation under the law. This assuredly was reviewable. The question was whether the law was correctly applied to the fact. In the instant case there is no such problem, for if as *a matter of fact* there was trust reposed in Mr. Smart by plaintiff and accepted by Mr. Smart the relationship existed. It is wholly factual and evidentiary.

The cases of *Bell* v. *Porter,* 189 Fed. (2d) 117, and *Exmoor Country Club* v. *U. S.,* 119 Fed. (2d) 961, are likewise cases wherein the reviewing court made its own application of a taxing statute to undisputed facts. In *Becker* v. *Loews, Inc.,* 133 Fed. (2d) 889, the court saw a photoplay and read a book and decided, contrary to the trial court, there was no infringement of the book by the photoplay. The book and play were undisputed objective evidence. Clearly the court could read and interpret both. None of these cases touch upon the situation existing here.

In our introductory statement we pointed out respondent's very evident attempt here to persuade this court to overlook the matters urged in the petition and view the case on respondent's version of the merits. Respondent is not exculpated from its error by its erroneous insistence that the Circuit Court of Appeals did not try the case *de novo* but accepted many findings of fact, only rejecting those it found clearly erroneous. Again we submit the Circuit Court of Appeals did not point out a single finding as clearly eroneous. It accepted none of the findings of the trial court on the existence of a relationship of trust and confidence.

We are at a loss to understand what respondent means by its statement that the "high water mark" of plaintiff's evidence did not meet the required degree of proof of a relationship of trust and confidence under Illinois law. Whatever may be the high water mark of petitioner's evidence, the findings accepted by respondent in its brief filed herein substantially support the finding of a fiduciary relationship and that finding was not clearly erroneous. The inherent vice in the court's decision is that it disregarded these findings.

We urged as a basis for granting the petition that the Circuit Court of Appeals had applied rule 52 (a) of the Federal Rules of Civil Procedure contrary to the decision of this court in the case of *United States* v. *U. S. Gypsum Co.,* 68 Sup. Ct. 525. Respondent in its brief at page 11 states that case to hold that the court may set aside all findings of fact if on a review of the entire record it is convinced those findings are wrong. We submit that is not the holding of the *United States* v. *U. S. Gypsum Co.* case. That case held a finding may be set aside if not supported by substantial evidence, or, if supported by evidence, if the reviewing court on the entire evidence was left with a definite and firm conviction that an error had been committed. We submit this definite and firm conviction referred to must be one of reason, not one of caprice. It must be based on the record, not on the mere fact that the reviewing court for undisclosed reasons does not agree with the result reached by the trial court. This court by its holding in the *United States Gypsum Co.* case did not intend to repeal rule 52 (a) of the Federal Rules of Procedure. That must be the result of that decision if the action of the Circuit Court of Appeals in the instant case be affirmed. We respectfully submit that it

is imperative the action of the Circuit Court of Appeals be corrected by this Honorable Court.

II.

The Improper and Capricious Action of the Circuit Court of Appeals in Disregarding The Findings of the Trial Court Was Not Justified.

Petitioner urged that the Circuit Court of Appeals in disregarding the requirements of Rule 52(a) of the Rules of Civil Procedure had so far departed from the accepted and usual procedure as to require the exercise by this court of its power of supervision over that court.

It is petitioner's theory of this case that the trust and confidence reposed in Mr. Smart by petitioner was violated by him. The question in the case is not a question of whether Mr. Vargas could read or write or whether he or his wife had an opportunity to read the contract before signing. The case proceeded on the assumption Mr. Vargas could read and did have the opportunity to read the contract. Petitioner contended that the trust and confidence he had that Mr. Smart would treat him fairly in regard to the contract blinded him in reading the contract just as surely as sand thrown in his eyes would have done.

There is not one scrap of evidence that he understood the contract. All the evidence points the other way. Here arises the significance of the trial court's finding that if he had known the facts he undoubtedly would not have signed the contract. (Finding 46; R. 781).

It is petitioner's theory that this position of trust and confidence being shown, the burden was upon respondent to show full disclosure and fair treatment. This it did

not do. The court on appeal made much of the fact that Mr. Smart did not represent to Mr. Vargas how many pictures he was to make. Mr. Smart just as surely did not tell him his work was to be increased. It is admitted by respondent that there was no disclosure to Mr. Vargas of the fact known to Mr. Smart that the pay of Mr. Vargas under the contract would be less than he had had in the previous year. There was no disclosure to Mr. Vargas that his percentage in the business of Varga products was such that if sales of those products amounted to $1,000,000 he would receive but $2,500. The least Mr. Smart could have done was to state these and other known and very pertinent facts.

In a situation such as this he should have advised Mr. Vargas to secure outside counsel. Where he knew he was imposing the terms of this onerous contract on Mr. Vargas, he should have sent him the contract for study and perusal, not made of the signing a light and festive occasion lasting but a few minutes.

Mr. Vargas' slavery was not slavery assuaged by a magnificent income as respondent would have it believed. Mr. Vargas was paid as a contractor to turn out 52 pictures a year and maintain his studio on Lake Shore Drive in Chicago. He received for that purpose in the first year under this contract the sum of $13,827.87. This resulted in his incurring a deficit of $5,395.40 for the year. These funds were advanced by Esquire, Inc. As had been the custom before this contract was made, Mr. Vargas was given no statement of his account. He was not asked to repay the sum advanced. At the end of 1945 he had earned sufficient to reduce this deficit on the books of Esquire, Inc. by the sum of $1,355.88, to $4,039.52. Respondent now seeks to collect the latter sum from Mr. Vargas in this suit. (R. 30).

The petitioner complains of the Circuit Court of Appeals' disregard of the findings of fact of the trial court relating to the *fiduciary relationship* between Mr. Vargas and Mr. Smart. The court's action on *the issue of fraud* is not now before the court. Any discussion of the absence of actual fraud is not pertinent to the petition. The contract, petitioner claims, is invalid by reason of Mr. Smart's violation of his trust. That invalidity is not cured by the absence of actual fraud.

There was no waiver by Mr. Vargas of his right to object to the validity of the contract. As we have said, there is no evidence that he read and understood it prior to Dec. 15, 1945. It was on that day he first discovered the contract called for him to furnish 52 pictures each year. He must produce a picture a week for 10 years. Contrary to respondent's contention it does appear on page 155 of the record how much time was required to produce a picture. Mr. Vargas under this schedule must work night and day, conceiving, draughting, finishing picture after picture. This was an extremely onerous task even were the pay ample. It was beyond human endurance. It was of this Mr. Vargas complained to Mr. Smart. He did this as soon as he ascertained the facts. This was in conformity with the law.

Respondent has said it was the fact Mr. Vargas wished more money which led him to object to Mr. Smart about his contract. This is not the record. The record shows Mr. Vargas on learning the provisions of the contract, firstly and most vehemently protested as to the number of pictures he was required to produce for Esquire, Inc. (R. 125).

We could add much more as to the injustice wrought on Mr. Vargas by the improper action of the Circuit

Court of Appeals. We submit no court is justified in departing from the rules set up to govern its actions. This court, however, hesitates to exercise any power of supervision over the lower court unless the court's action tends to lessen respect for the court. We urged the personal injustice to Mr. Vargas as reflecting on the court. We believe the court must agree that the unwilling servitude to which it is sought to subject him is in effect a sentence to involuntary servitude. We submit petitioner is entitled to pursue his art as a means of livelihood, unfettered by shackles clamped on him through judicial error and caprice. Petitioner repeats his request for the exercise by the court of its power to supervise and correct the error of the Circuit Court of Appeals.

III.

The Circuit Court of Appeals Erred in Not Remanding the Cause For Further Proceedings in the Declaratory Judgment Action.

Respondent contends that all the relief asked by petitioner is based on the contract being null and void. We do not agree with that contention. It further states the prayer for relief as: (a) that the contract be declared null and void, (b) that plaintiff recover on a *quantum meruit*, etc. This statement of the prayer for relief entirely disregards the prayer as set up in the complaint. We quote from the prayer of the complaint (R. 13).

> "Wherefore the plaintiff asks:
>
> (a) *That the court examine into and declare the rights of the parties in relation to the contract Exhibit "A" hereto;* that in connection with such declaration the court find and decree said contract to be null and void and of no binding effect on the plaintiff.
>
> (b) That the court decree that the plaintiff, etc."

The first request is that the court examine into and declare the rights of the parties under the contract in question. The court assuredly is interested in the party's own contention as to that contract. For that reason the petitioner stated his contention that it was null and void and asked the Court so to find.

The complaint on its face shows that it is not merely a complaint to set aside a contract. It sets up fully the situation of the parties and asks for declaratory relief. Under it petitioner is entitled to a full declaration of his rights, including a declaration of his rights in the event the contract be held valid.

At present we are confronted with a situation where, although the contract be held valid, petitioner has not furnished pictures under it for almost two years, nor has respondent paid any sum to him pursuant to its terms. During that period the parties have engaged in constant and acrimonious litigation concerning this contract. This has resulted in much ill feeling between them.

The petitioner has been replaced as a feature artist in respondent's publication. Although respondent states in its brief it desires to continue under the contract, it has at other times made contrary declarations and is not, we believe, sincere in its present declaration. At all events, at all times since petitioner refused further to furnish pictures respondent at every opportunity, even in its brief herein, has insulted and slandered Mr. Vargas and his work. It at the same time has sought to take for itself and its agents all credit for the success of petitioner's work. To say that petitioner entirely lacks respect for the agents of respondent, with whom he must be associated in his work for respondent, is stating the case very mildly. Despite the legal effect of any decision rendered herein,

Mr. Vargas must at least view Mr. Smart as having violated the trust reposed in him; as having deceived him and imposed upon him. No human being could render the type of work demanded by the contract under such a situation.

We believe evidence at a further hearing will show respondent does not wish petitioner's services, and certainly that petitioner does not wish to serve respondent. We believe no court under the conditions of this case will subject petitioner to involuntary servitude. His rights must be declared that he may earn a livelihood. It is the law that a court will not by mandatory injunction compel petitioner to paint pictures for respondent. Respondent in its counterclaim has asked the court to restrain petitioner from furnishing any drawings to any other person. (R. 29). Petitioner contends that the court in this instance will not enforce the negative covenants of the contract. This is on the ground that where it appears concerning a contract of this nature that overreaching was present in the obtaining of the contract then, even though that overreaching was not such as would justify the setting aside of the contract, the court will not enforce the negative covenants of the contract. This rule must apply here.

In view of the nature of the complaint, its prayer for relief and the complex and tangled situation confronting the parties we submit that the petitioner is without doubt entitled to the further aid of the court in clarifying the situation and that it was error for the Circuit Court of Appeals summarily to order the complaint dismissed.

CONCLUSION.

We submit that nothing urged by respondent has established any reason for the denial of the petition herein. The discussion of the disregard by the Circuit Court of Appeals of the findings of the trial court has only served more clearly to point out its error. The conclusion as regards these findings is that by respondent's own admissions they are not only not clearly erroneous but on the contrary are clearly established by the evidence.

The facts discussed at length by respondent go only to the merits of the case. We do not agree in any particular with the respondent's statement of the facts. However, as we pointed out, they are not directly in issue at this time. It must appear to the court that the facts almost without exception are contested. That is all the more reason for strict observance of the rule in question by the Circuit Court of Appeals.

We further urge that the error of the Circuit Court of Appeals in ordering a dismissal of the case is apparent when we view the present situation of the parties. Observance of the Declaratory Judgment Act demands that a clear and detailed declaration of their respective rights be made.

Petitioner again respectfully requests that the writ be granted.

Respectfully submitted,

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